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# AN ABUSED PRIVILEGE.

Privilege, the exception of a person or class from the common rule, if not an abuse in its inception, is proverbially sure to become one. The less there is of it under a reign of law the better. In its administration of justice the State's purpose—whatever that of litigants may be—is, presumably, to ascertain the truth between parties and dispense justice on that basis. How this theory is modified,—and to some degree inevitably so,—by the necessities of practice is less understood by laymen than by lawyers who have embodied in such maxims as "sit finis litis," "Hard cases make bad law," and the like, their apprehension of the fact that, in a world of relativity, truth and justice must be subordinated at certain times and in particular cases to the exigencies of general rules and the determination of strife. The broad maxim, that no case is decided until it is decided rightly, is lost in the fog when we come to define "rightly" and ask ourselves whether it is an adverb of the law or of abstract morals. Lord Esher when retiring from the bench avowed that he had always sought to decide in accordance with truth and justice. His critics answered that this creditable aim had made a very unsettling judge of His Lordship, and called down upon his head the curse provided for him who removeth legal landmarks; since no individual's idea of right yields, from their view-point, results comparable to those achieved by playing the game according to the rigor of the rules. It seems paradoxical that a system devised for the ascertainment of truth should embody rules expressly framed to conceal it; yet every privilege that allows a witness to stand mute is such a rule. It is, to say the least, fairly open to question whether the Latin or Continental method of investigating crime, by early interrogations of the suspected, is not better adapted to ascertaining the real facts than is ours of giving the accused and his counsel every opportunity, up to the close of trial, to change his theory of defense.

If the inquisition of the *juge d'instruction* is not in accord with our sense of fair play, neither did the common law rule excluding from the witness stand parties in interest, upon the assumption that King David's hasty dictum

was sound after all, and that, in their own behalf at least, all men will lie, seem fair to reformers of the old practise. It appeared to them particularly unjust that one charged with crime should not be allowed to testify to his innocence. Accordingly they secured for the prisoner opportunity of speaking, and fancied they had safeguarded him, should he decline his privilege, by providing that his refusal to seize the occasion should not be construed against him. But here again it is questionable whether a reform which was neither one thing nor the other has helped either the cause of truth or the person accused of crime. It seems fairly certain, in the majority of cases, that the prisoner, who refuses to proclaim his innocence after the court has put him to his defense, will be esteemed guilty by average laymen, including jurors, and, even if acquitted, will pass through life under the stigma of the Scotch verdict, "not proven,"—a determination satisfactory enough to him who only wants to win the game by any means, but excessively galling to the man with a sense of innocence and a sentiment of honor.

Epaminondas, who loved the truth so well that he would not lie, even in jest, has rendered excellent post-mortem service in illustrating by his little idiosyncrasy the use of the Latin genitive and subjunctive; but he would have made a poor attorney in actions for personal injury, or on insurance policies, or under wills, where his clients' interest apparently demanded the suppression of a true clinical history of the physical or mental condition in issue,—a poor attorney, that is to say, from the standpoint of many, but, let us hope, a good one from the standpoint of as many more.

At the trial of Elizabeth calling herself Duchess of Kingston, on a charge of bigamy, before the Right Honorable The House of Peers in full Parliament assembled in April, 1776,[1] being the 16th year of George III., the main question was whether she, being the wife of Augustus John Hervey, then living, did, as charged in the indictment, with force of arms feloniously marry and take to husband Evelyn Pierrepont, Duke of Kingston, against the statute and the peace of Our Lord the King. In a suit for

[1] 20 How. St. Trials 355.

jactitation of marriage theretofore brought by her against said Hervey, the Ecclesiastical Court had decided in her favor; finding that she was a spinster, and that said Hervey's claim to have married her, albeit expressed with exceeding frankness and detail in his answer, was vain boasting. This judgment she pleaded in bar, but to no purpose; for Our Lord The King, not having been a party to the jactitation suit was not bound by it; and Elizabeth was forced to meet the issues. There was reason to believe that this noble lady, although found to be a spinster by the Ecclesiastical Court, had given birth to a child during the period in which Mr., or Lieutenant, Hervey had, so to speak, jactitated his marriage with her; and, in order to ascertain the truth of this matter, the solicitor general called as a witness Mr. Cæsar Hawkins, Surgeon, who, to the question, "Do you know from the parties of any marriage between them?" answered, "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed consistent with my professional honor." Thereupon Lord Mansfield said, assuming the law to be settled, as to mere surgeons, at all events: "* * * If all your lordships acquiesce, Mr. Hawkins will understand that it is your judgment and opinion, that a surgeon has no privilege, when it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted that if Mr. Hawkins understands that, it is a satisfaction to him and a clear justification to all the world. If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honor and of great indiscretion; but to give his information in a Court of Justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." [1]

Accordingly Mr. Hawkins—Sir Cæsar he became later—having eased his professional conscience, testified that Elizabeth had admitted to him the Hervey marriage, and that he was in the room when she was delivered of the

[1] (1776), 20 How. St. Trials at p. 573.

child—but only in attendance for emergency, it would seem, and not actually "treating the case." When Lord Barrington, a later witness, was questioned, he also, while professing the utmost willingness to testify to matters within his ordinary knowledge, objected strenuously, "that as a man of honor, as a man regardful of the laws of society," he should not be called upon to reveal any confidential communication of the Duchess. This punctilio of a peer was more puzzling to their lordships than the professional scruples of a mere surgeon; nevertheless, after much debate and an adjournment for discussion, they decided that even the mutual trust reposed in one another by persons of pedigree ought not to stand in the way of the Eternal Verities. So, in the end, the poor lady through these breaches of confidence was found to have committed bigamy; but, as her former husband had become an earl, she, whether Duchess of Kingston or not, was a peeress beyond dispute and entitled by pleading her clergy to save her lily hand from the burning that a more plebeian member would have been sentenced to endure. Of their privilege she availed herself and escaped with a solemn warning, not to give away that hand again while she should be "in vinculis matrimonii."

This question of privilege between clients and attorneys coming up later in Wilson *v.* Rastall [1] Buller, J., speaking generally upon the subject, uttered that obiter lament, over the lack of a like privilege for confidential communications generally, and particularly those to medical men, which seems to have borne fruit in the embodiment in the revision of the New York Statutes of that section creating the patients' privilege which has been copied, with more or less modification into the statutes of half the other States and Territories of our country; not including, however, New York's close neighbors, New Jersey and Massachusetts. Subsequently the question came up again, this time as affecting medical men, in Rex *v.* Elizabeth Gibbons [2] wherein, defendant being on trial for murder of her bastard, Mr. Cozzens, a surgeon, was called to prove her confession

[1] (1792) 4 Term Rep. 753, 759; see the note of the Revisers, citing this case, *infra*.

[2] (1823) 1 C. & P. 97; cf. Hawkins Pleas of the Crown, Bk. 2, C. 46, §88, 8th ed., Curwood; §92 Leache's ed.

to him and objected to testifying upon the ground that "he was attending the prisoner in his capacity of surgeon." To this objection Parke, J., answered, "That is no sufficient reason to prevent a disclosure for the purposes of justice"; since which day the point does not appear from the law reports to have been mooted in England.

It was about the time of this last decision that the New York revisers introduced into the law of that State the patient's privilege, by the following section:

"No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon." [1]

This innovation was supported by the following note:

["In 4 Term, Rep. 580, Buller, J. (to whom no one will attribute a disposition to relax the rules of evidence), said it was 'much to be lamented' that the information specified in this section was not privileged. Mr. Phillips expresses the same sentiment in his treatise on evidence, p. 104.[2] The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense for prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will in most cases furnish a temptation to the perversion or concealment of truth, too strong

[1] N. Y. Rev. Stats. 1st ed. Vol. 2, p. 406, Pt. III, Ch. VII, Tit. III, Art. 8, Sec. 73.

[2] As Buller, J., and Mr. Phillips share the responsibility of this experiment it may be worth while to note just what they did say on this point. In Wilson *v.* Rastall, supra, Buller's remarks were not confined to regret of the lack of privilege between physician and patients, but he lamented generally that confidence should ever have to be broken, saying: "It is indeed hard in many cases to compel a friend to disclose a confidential conversation and I should be glad if by law such evidence could be excluded." To this broad statement he adds: "There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in the Duchess of Kingston's case where Sir C. Hawkins, who had attended the Duchess as a medical person, made the objection himself, but was overruled and compelled to give evidence against the prisoner." Mr. Phillips simply quotes Buller's "obiter dicta."

for human resistance. In every view that can be taken of the policy, justice or humanity of the rule, as it exists, its relaxation seems highly expedient. It is believed that the proposition in the section is so guarded, that it cannot be abused by applying it to cases not intended to be privileged"[1].

Whether this belief of the Revisers—that their limitation of the privilege to cases wherein a "duly authorized" practitioner should be interrogated as to information acquired "in attendance on a patient in a professional character" and "necessary to enable him to prescribe," etc., had so guarded it against the abuse of application to cases not intended to be privileged—has proved a fond hope or not, depends upon what they expected to effect. If they wished to protect the sick-room secrets, they did not go far enough. In that event they should have limited the privileged information either to that acquired by licentiates only, or to that necessary for treating the case; and they should have made a substantive penal law as the French have done, not a mere rule of evidence. If they expected to close the door to fraud, they failed of success for they opened that door particularly wide. They were, not unnaturally, misled by a false analogy between the patient consulting a medical man with no thought and with little probability of litigation, and, in most cases, with no aversion to publicity, and the client consulting an attorney upon

[1] Original Reports of Revisers, Vol. V, p. 34; Rev. Stats. 2 ed., Vol. III, p. 737. "The struggle between legal duty, on the one hand, and professional honor, on the other," was not terminated by this enactment but was rather exaggerated, though altered, in character; the question now being whether to let the truth come out or to stop it by the legal plea of privilege.

The substantial modifications of the Revisers' draft in other jurisdictions, may thus be generally summarized: The omission of the qualifying, words "duly authorized," "regular" or "licensed" before the physician thus according the privilege, apparently, to patients treated by non-licentiates, as in Alaska and North Dakota; the use of the words "against objection," implying that the physician may testify unless objection be made, as in Alaska; the use of the words "without the consent of," as in California and Arizona, implying the need of positive consent; the suspension of the privilege in actions between physician and patient, where the treatment is in issue, as in California; the use of the word "confidential," as in the District of Columbia, and the suspension of the privilege where the interests of justice require it, as in the District of Columbia and North Carolina; or, more specifically, when the action involves the issue of wrongful death or injury, as in California; the limitation of the prohibition to testimony tending to "blacken character," as in Pennsylvania; and the provision that by testifying to his condition the patient waives the privilege, as in Arizona, Ohio, Oklahoma and Oregon.

matters of law with a strong likelihood of being involved in litigation. Undoubtedly they intended to give the patient, to use a now hackneyed phrase, a shield for defense, not a weapon for aggression; nor is it likely that they contemplated the possibility of aiding litigants to capitalize their maladies in court and conceal the fraudulent nature of their assets: yet this they have done.

French legislation has been more logical in regarding the patient's confidences to be as worthy of protection outside as inside the court room, and in sanctioning a real "*secret médical*" by making their disclosure, except under compulsion of law, punishable by fine and imprisonment; [1] thus treating the fulfillment of trust as a public duty, not a private privilege.[2] It was reserved for the State of New York and its imitators to achieve the incongruity of forbidding in a trial between private parties revelations of facts material to, and even constituting, the issues, although published already to the world in medical journals [3] or certificates made pursuant to law or custom; [4] in the same statute book to authorize physical examinations of a party, to require medical men to report contagious diseases and to state the causes of death and incidents of birth in public certificates, yet to forbid an attending physician, if licensed, or a nurse, if registered, to tell the whole truth as to a physical condition displayed in open court by the patient,[5] while at the same time compelling qualified medical men, if unlicensed in the jurisdiction, or unregistered nurses to reveal the most sacred confidences, classing with these non-

[1] "Code Pénal, Art. 378.—Les mêdecins, chirurgieurs et autres officiers de santé, ainsi que les pharmacieurs, les sages-femmes et autres personnes dépositaires, par état ou profesion, des secrets qu'on leur confie, qui, hors le cas où la loi les oblige à se porter dénonciateurs, auront révélé ces secrets, seront punis d'un emprissonnement d'un mois à six mois et d'une amende de cent francs à cinq cents francs."

[2] What is said in this article of French Law must be credited for the most part to Dr. Ch. Vibert's Precis de Medecine Legale, Paris: Baillieres et fils, 1896.

[3] Scher *v.* Met. R. R. (1902) 1 App. Div. 28.

[4] Davis *v.* Supreme Lodge Knights of Honor (1900) 165 N. Y. 159; Becker *v.* Met. Life Ins. Co. (1904) 99 App. Div. 5; reversing (1900) 43 Misc. 99; Robinson *v.* Sup. Council (1902) 38 Misc. 97; affirmed 177 N. Y. 564; Carmichael *v.* John Hancock Co. (1904) 90 N. Y. Supp. 1033.

[5] Dunkle *v.* McAllister (1902) 70 App. Div. 273.

licentiates the licensed and registered dentists who, practising in a special department of medicine and surgery, are required by the law to pass exacting examinations in fundamental branches of medical science.[1]

There can be no doubt among honorable men that one of a physician's highest duties is to keep sacred not only the intimate knowledge of his patient's physical condition and affairs acquired in the professional relation, but especially all that he learned by communications or observation under the seal of confidence; but it is not his highest duty nor could the law safely allow it to be so considered, to abstain from testifying whenever in his judgment an answer would involve a breach of professional confidence. The popular idea that physicians are bound absolutely to keep secret their knowledge of a patient's condition is mistaken; were it true, the obligation would be broken daily. The so-called Hippocratic oath, whether rightly attributed to the Father of Medicine or not, once generally administered by schools and preceptors, but now largely fallen into disuse, expressed the true spirit of the medical man: "I swear by Apollo, the physician, and Æsculapius and Hygeia and Panacea and all the gods and goddesses, that, according to my ability and judgment, I will keep this oath and this stipulation. * * * Whatever I see or hear in the life of men, whether in connection with my professional practice or not, that ought not to be spoken of abroad, I will not divulge; considering that all such knowledge should be kept secret." Here is no vow of absolute secrecy; not even a limitation of duty to patients. It is a general obligation that the physician will abstain from gossip and observe a decent regard for the privacy of all men, not saying what in his judgment

[1] People *v.* DeFranc (1895) 104 Mich. 563; 62 N. W. 209. The status of dentists as medical men is not adjudicated in New York, but it is held that there is no privilege preventing a druggist from testifying to a prescription. Deutschmann *v.* Third Ave. R. R. (1903) 87 App. Div. 503.

The climax of burlesque in the matter of privilege was reached in Hendershott *v.* West. Union Tel. Co. (1898) 76 N. W. 828. A telegraphed to B, a veterinary, to attend Bravo, a sick horse. The telegram was delayed and Bravo died. A sued the Company, whose counsel, on cross-examination, asked B what A had said of Bravo's symptoms. Objection to this, on the ground of privilege, was sustained; but on appeal it was held that the privilege conferred by the Iowa code on communications by patient to physician does not apply to communications made by a horse, or, more fairly speaking, to veterinaries.

were better left unsaid.[1] Under no higher assurance of secrecy than this, generations of men have confided their maladies, and their griefs as well, to medical advisers. In half of the United States they still have no higher assurance, if they have one as high. And it may well be doubted whether any appreciable number of patients have been, or to-day are, deterred from consulting medical men by fear that their confidences might be disclosed in a law court.

Litigation is too uncommon an incident in the life of the average man for the anticipation of it to prove a deterrent. Gossip, on the other hand, and the desire to publish scientific, or pseudo-scientific papers are constant temptations to violation of confidence.[2] Yet the physician is left free under our law to prattle at will of his patient's condition and affairs, subject in remote contingencies to a civil

[1] In many, probably in the great majority, of the medical schools neither this oath, nor any modification of it, is any longer required. Of the three great colleges in New York City, the Physicians and Surgeons, University and Bellevue Hospital Medical College and Cornell, only the first named follows the ancient custom, administering to its graduates an oath including this pledge: "That you will keep private and inviolable all family secrets which may be confided to you as physicians, and will protect, so far as in you lies, the interests committed to your charge." It also requires them to subscribe a solemn pledge that, among other things, they "will inviolably keep the innocent secrets of the patients and their families for whom we (they) may be called to prescribe."

[2] *Plusieurs jurisconsultes admettent que la divulgation du secret n'est punissable que si elle a été faite dans l'intention de nuire ou par esprit de causticité, par le desir d'alimenter la malignité au moyen de confidences indecentes, d'anecdotes scandaleuses,*" etc., says Vibert (p. 786); but he adds that this theory was effectively refuted by the judgment of the *Tribunal de la Seine* (March 11, 1885), confirmed on appeal, fining Doctor Watelet 100 francs for publishing in *le Matin* a letter discussing the malady and treatment of his late patient, the artist, Bastien Le Page. The decision expressly says that the disclosure could only palliate but could not excuse the offense; the physician's motive in this case being to defend himself from criticism. On the other hand, malicious intent naturally enhances a punishment, as in the case of one Halbrand, who was condemned by the same tribunal (March 11, 1864) to a year's imprisonment, five years of surveillance and to pay a fine of 500 francs and also 1,000 francs damages to the aggrieved patient, for giving out bills for collection and enumerating in them certain maladies and their supposed source. In a somewhat similar case in New York recently, where a physician sued for his fees, the defendant's attorney demanded a bill of particulars. Under the French law the patient being unable to waive his privilege, which as already said, belongs to the public, it would seem that such a bill could not be rendered even if demanded except at the risk of a fine. "Quære" could it have been offered in evidence under the New York procedure if the patient had objected on the trial? It would seem not, under the rule laid down in Clifford *v.* D. & R. G. R. R. Co. (Supreme Court Ap. Div. 1st Dept. March, 1906) N. Y. L. J. March 27th, 1906.

action for damages, and is forbidden to speak of them only when the interests of justice demand disclosure of that truth which the patient, it may be, is suppressing or misrepresenting in court.

The provisions of both the French Statutes and our own have their common origin in the general and laudable sentiment of mankind that confidence should be sacred. The Revisers did not use the word "confidence" but the Code Pénal does, "*des secrets qu'on leur confie.*" But despite this clear language, it is said by text writers that article 378 embraces not only what has been confided to the physician but also whatever he has learned in his professional capacity; and it will be noted that there is no limitation corresponding to our requirement, that the privileged information should have been necessary for the treatment of the case or to enable the medical person to act in a "professional capacity." It has become a rule among French physicians, says Vibert, to refuse to life insurance companies, certificates as to the health and antecedents of the patients, or certificates as to the cause of death of the insured. Of course the physicians of the companies do not stand in the confidential relation of physician to those whom they examine for their employers.

Another point of infinite importance to the welfare of the State is formally discussed by the French writers, namely, whether a physician is justified in revealing the condition of a patient, about to marry, in reply to inquiries by the family of the affianced one. Vibert says he knows of no adjudicated cases on the point, but that all text writers, and notably Brouardel, are unanimously of opinion that such information should be refused. And yet he says (p. 794) that a physician who, obeying article 378, should fail to inform a wet nurse of an infectious congenital malady affecting a child, would not only be guilty of a base act, but would be liable to an action for any damages sustained by the nurse; citing to this point a decree of the "Cour de Dijon" (May 14, 1866).[1]

[1] "*Le Médecin qui sciemment laisse ignorer a une nourrice les dangers auxquels l'expose l'allaitment d'un enfant atteint de syphilis congenitale peut etre déclaré responsable du prejudice causé par sa retiscence. Il ne saurait pretendre qu'appelé à donner des soins à l'enfant seul, il n'avait pas à se préoccuper du danger que peut courir la nour-*

It is also laid down by Vibert that a physician, who should reveal to an employer the maladies of a servant or other employee, would be liable to prosecution by the person so betrayed. But certainly if good morals require a physician to safeguard a hired nurse against her charge, and if failure so to do would subject him to damages, much more would it seem to be a duty to anticipate the calamity and protect innocent womanhood from a marriage sure to entail misery upon her and her offspring.

Vibert recognizes this logic, and admits that in gross cases,—cases wherein a man, if such an one may be so called, incapable of appeals to honor or sense of right persists in a marriage against which he has been warned by the physician,—it may be the latter's duty to avert the threatened wrong by disclosing the truth.

So, too, in the matter of declaring births a question of professional honor arises that the French writers feel bound to take into account.

"*On comprend que lorsqu'il s'agit d'une femme non mariée, ou d'une femme séparée de son mari, il peut arriver que celle-ci ait le plus grand intérêt à cacher son accouchement, qu'elle ne se fie au médecin que sous le sceau du secret.*"

This problem seems to have been passed upon in the courts with the result that it is held to be a sufficient compliance with the law for the physician to report the bare fact of the birth without giving the names of parents or even the house number or street of the mother's residence; a solution, however, confessedly of little effect in securing

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*rice: un pareil système, qui blesse les lois de la morale, ne peut être invoqué contre une nourrice, á laquelle sa situation même impose une confiance nécessaire dans le médecin choisi par la famille de l'enfant.*"

"*Dans certains cas la conduite du Dr. Gaide s'impose comme une véritable obligation de conscience. Quand un syphilitique est en pleine période contagieuse, qu'il a resiste a toutes les representations que lui a faites son médecin, que dûment averti des dangers qu'il fait courir á sa future famille, il se montre cependant résolu á passer outre, nou pensons que son médecin s'exposerait à de cruels remords, s'il laissait s'accomplir un marriage dans de telles conditions, en refusant au père de la fiancée tout avertissement sur les désastres qui en seront la conséquence. L'opinion du Dr. Gaide, avec les réserves dont il l'accompagne, parâit donc fort juste, et il est probable qu'a l'occasion, la majorité des médecins s'y conformeraient.*" And he suggests that in such an event the physician would not be likely to risk a suit for damages inasmuch as the patient would not willingly make public his condition. He does not touch, however, upon the possibility of suit following error real or alleged in diagnosis.

the desired secrecy in rural districts. There remain other puzzles. Article 378 of the Penal Code exempts, as has been seen, cases in which the physician is required by law to lodge complaints. What those cases are seems to be undetermined. Article 30 of the "Code d'instruction criminelle," requires every witness of an attempt against the public safety or an individual's life or property, to report it to the proper authority. But there is no penalty attaching to disobedience of the command, and herein is a loophole of escape for one who desires to guard the patient's secret. When it comes to testifying in court, however, Article 80 of that Code provides a fine not exceeding 100 francs for any one refusing to obey subpœna and an order compelling attendance, analogous to our bench warrant. And it has been held that while a physician cannot decline to answer on the ground that he acquired the information sought to be elicited in the practice of his profession, since that would leave evidence dependent upon the whim of the witness, yet one may decline to answer on the ground that this information was confided to him under the seal of the secrecy to which he is bound by his profession. Accordingly in the year 1853 Dr. Cayeaux being questioned as to certain facts learned by him in the course of his practice, hit off this happy formula, that Vibert seems to regard as acceptable to the courts: "I consider as confidential the relations by which I acquired knowledge of the facts to which the question relates, and therefore cannot answer." This noncommittal formula, says our author, evinces a sublety worthy of the schoolmen, safeguards all the patient's interests; whereas to say explicitly that the facts had been acquired in confidence would be to admit that there was an important secret to conceal.

The obligation of secrecy being in the public interest cannot be waived, as with us, by the patient. Accordingly the Court of Grenoble on August 23, 1828, held in a woman's action for separation that she could not question her physician as to her physical condition.

A curious resultant of the opposition between the professional secret and the law requiring witnesses to appear and testify was manifested in the case of Doctor Berrut subpœnaed before the "Cour d'Assizes de la Seine" in a case

of abortion. Having a logical mind the doctor refused to be sworn, saying that the oath required him to tell the whole truth, while to do so would be incompatible with the professional duty of secrecy. The Court held, however, that as § 317 of the "Code d'instruction criminelle" required every witness to be sworn, and as no law dispensed with this requirement in physicians, Article 378 only providing that they should not disclose secrets confided to them in the practice of the profession, therefore Dr. Berrut should be considered as disobeying the subpœna and fined 100 francs.

This sketch of the French Law as expounded in Vibert and still more fully by Brouardell[1] serves to give an idea of the questions arising under a Code of Substantive law penalizing any revelation of the patient's secret and they are well worth contrasting with those arising under our Codes of Procedure the prohibitions of which are without sanction.

It is particularly worthy of reflection that while our various health laws require medical men to report contagious diseases under penalties for refusal,[2] the most dangerous of those diseases are not officially scheduled as contagious and are never reported. On this matter there appears to be an awakening of late among medical men and laymen to the need of making organized efforts to check the spread of maladies that modern medicine recognizes to be the greatest scourges of humanity, the hitherto unrecognized causes of woes unnumbered. Much has been accomplished in reconciling public opinion to active measures against tuberculosis. The cause of sanitary and moral prophylaxsis has greater tasks ahead in bringing about the union of sane minds with sound bodies. Its objective point is clear enough; what is obscure is the best method of planning its campaigns. But, whatever method be adopted, the legal relation to them of the medical secret is bound to be of vital importance.

It is only necessary to examine some of the reported

[1] Le Secret Medical Honoraire, mariage, assurances sur la vie, declaration de naissance, expertise, temoinage, etc. Paris, 1893. pp. 280.

[2] See "Duty as to Contagious Diseases," in the present writer's general article, entitled "Of Certain Legal Relations of Physicians and Surgeons to their Patients and to One Another," in Hamilton Godkin's System of Legal Medicine, vol. 1, p. 633, and cases there cited.

cases in which the patient's privilege is involved to find results that the Revisers of the New York Statutes and their imitators certainly could not have anticipated. Twelve years ago the present writer attempted in the general article upon the legal relations of physicians and patients (cited *supra*) to express the purpose and results up to that time of this legislation so far as limited space would allow.[1] Since then cases have multiplied, and statutory changes have been made, some of which will be here examined. They tend to increase the difficulty of ascertaining truth in cases that present as an issue the physical or mental condition of a party, or of a decedent whose representative is a party, to an action.

It is falsehood's nature to grow rapidly; and while a statute that commands the *suppressio veri* is not so evil as one would be,—happily it is not yet existent,—requiring the *expressio falsi;* the former is nevertheless on the defensive. It must show justification by good works. Judging by this standard the Revisers' experiment after the test of nearly a century does not appear to have accomplished its benign purpose. Its safeguards have been insufficient; and Professor Wigmore's criticism of the present rule[2] is not without justification, sweeping as it is. The privilege, designed as a shield to the innocent, has proved a handy weapon eagerly seized by unscrupulous attorneys and reluctantly availed of by their more conscientious fellows, whose sense of professional honor, as distinguished from the other kind, seems to impose upon them the obligation of utilizing every legitimate, or rather lawful, means for winning the client's cause, constraining them to raise the objection of privilege, as they plead the defences of limitations and usury. The climax of the farce-tragedy comes when murderers[3] and ravishers[4] invoke their victims' privilege to cover their own guilt, thus forcing courts to construe away the plain letter of the law

[1] Hamilton's Legal Medicine 625. Cited in 4 Wigmore on Evidence 3350.

[2] 4 Wigmore on Evidence § 2380 *et seq.*

[3] People *v.* Pierson (1880) 79 N. Y. 424; People *v.* Harris (1893) 136 N. Y. 423.

[4] State *v.* Depoistor (Nev. 1891) 25 Pac. 1000; James *v.* State (Wis. 1905) 102 N. W. 320.

in order that its spirit may not be thwarted. And it is probably not exaggeration to say that few cases can be found in the reports wherein a plaintiff claiming damages for personal injuries has invoked this privilege for any other purpose than to conceal what in honesty should have been made known and what, in so far as it affected his privacy, he was not at the time to a greater or less extent exhibiting in the action.

The New York statute, which, being the type, best serves as a text, remained as drafted by the Revisers until the year 1876,[1] when it was incorporated into the short-lived Code of Remedial Justice with a change of phraseology substituting the words "necessary to enable him to act in that capacity," for the original words, "necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon." A new section was also drafted[2] pro-

[1] Sec. 834, LL. 1876.

[2] Johnson *v.* Johnson (N. Y. 1835) 14 Wend. 637, holding that the privilege was the patient's and not the physician's and could be waived by the former only, had been construed by some to mean that there was no privilege on a default. Accordingly the framers of the Code of Remedial Justice in transferring thereto, as §§ 833, 834 and 835, the provisions of the Revised Statutes, making privileged communications to clergymen, medical men and attorneys, undertook to meet that construction by the following section, the italics being ours. "§ 836. The last three sections apply to any examination of a person as a witness, unless the person confessing, the patient, or the client, as the case requires, is present or represented by counsel, and *does not object to the testimony.*" In the following year, Chapter 416 of the Laws of 1877, changed this section to read. "Section 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are *expressly waived* by the person confessing, the patient or the client." Chapter 381 of the Laws of 1891 amended the section to provide for waiver on trial and to read. "The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived *upon the trial or examination* by the person confessing, the patient or the client. But a physician or surgeon may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased which he acquired in attending such patient professionally, *except confidential communications and such facts as would tend to disgrace the memory of the patient,* when the provisions of section eight hundred and thirty-four have been expressly waived on such trial or examination by the personal representative of the deceased patient or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will." Chapter 514 of the Laws of 1892, added to the section after the words "executors named in said will" the following, "or the surviving husband, widow, or any heir-at-law, or any of the next of kin of such deceased or any other party in interest." What is to happen when representatives disagree is not provided for. Any of them may exercise rights Re Hopkins (1902) 73 App. Div. 559; reversed on another point, 172 N. Y. 360. The amendment also provides that an attorney subscribing a will as a witness may testify on its probate. Chapter 295 of the Laws of

viding for waivers, which was amended in the following year, when the said Code took its present name, *i. e.*, Code of Civil Procedure. In 1904 "professional and registered nurses" were included with physicians, and in 1905 a further addition was made in order to afford evidence of crime committed upon children under the age of consent: so that to-day the Code of Civil Procedure, § 834, reads as follows:

"§ 834. A person, duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry."

It is noteworthy that this exception allowing physicians and nurses to testify as to crime committed upon the patient being confined to cases of infants does not affect the doctrine of the Pierson and Harris cases, *supra*, nor does it en-

1893 further amended the section by providing that in actions to recover damages for personal injuries the testimony of members of medical staffs of hospitals, dispensaries or other charitable institutions as to the knowledge they had acquired professionally should be taken before a referee; providing, however, that the judge might also in his discretion order a subpœna to issue. A convenience for the staff; but expensive to litigants. Chapter 53 of the Laws of 1899 added to this section these words: "The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor." This last amendment was intended presumably to provide against unconscious waivers by applicants for insurance policies in signing their applications. But why, in order to achieve this object should the New York statute book be decorated with a rule reversing the Aristotelian axiom that the whole is greater than a part, and the ordinary principle of law that an agent can have no greater power than his principal? Why should the patient be forbidden to waive his own privilege out of court, while the attorney on a contingent fee is allowed to do so? Thus modern legislation meets special cases. Chapter 331 of the Laws of 1904 incorporated in this section after the words "physician or surgeon" the words "or a professional or registered nurse." Finally Chapter 331 of the Laws of 1905 added to section 834 the words stated in the text to be intended for children under the age of consent to wit: "unless, where the patient is a child under the age of sixteen, information so acquired indicates that the patient has been the victim or subject of a crime," etc.

large the law beyond the construction of the court in the Depoister case, *supra.*

Having created this privilege for patients, the Revisers considered their work finished, and made no provision for its waiver. A party was not bound to avail himself of his privileges, which, as stated in the note, it was early held belong to the patient and not to the physician.[1]

The early judicial tendency was to construe the statute strictly,[2] so as to confine the privilege to confidential communications, and to imply waivers; and even after the amendment of 1877 (note *supra*) the physician, in the absence of objection, was allowed by the New York rule to testify as to privileged matter;[3] although Cooley, J., expressed in harsh terms his opinion that, under the Michigan statute, identical with that of New York, even a mere commissioner to take testimony should have excluded certain evidence "sua sponte."[4] It seemed at first blush clear enough that a person putting his infirmity in evidence for the sake of damages waived its secrecy and opened the door for the whole truth relating to it. And so in the Treanor case[5] it was held, by a very able Judge, to be error, after plaintiff had minutely testified to her injury, to exclude her physician's testimony as to what he had found it to be. It was said that the express waiver prescribed by the statute might be inferred from conduct,[6] and therefore that where A testifies to a confidential interview with his physician, the latter may be called to contradict the patient. It was also suggested that as the privilege was given to enable a patient to hide his maladies, it was not available in a case, like that at bar, to exclude testimony to

[1] Johnson *v.* Johnson, *supra.*

[2] Earl, J. Edington *v.* Ætna Life Ins. Co. (1879) 77 N. Y. 564; Grattan *v.* Met. Life (1880) 80 N. Y. 281. He gave up his contention in Renihan *v.* Dennin (1886) 103 N. Y. 573. Cf. Linz *v.* Life Ins. Co. (1880) 8 Mo. App. 363, disapproved in Kling *v.* City of Kansas (1887) 27 Mo. App. 231; Gartside *v.* Ins. Co (1882) 76 Mo. 446.

[3] Hoyt *v.* Hoyt (1889) 112 N. Y. 493, 515.

[4] Storrs *v.* Scougale (1882) 48 Mich. 387, a gross case; cf. Re Hannah (1887) 11 N. Y. St. R. 807.

[5] Treanor *v.* Man. Ry. Co. (Pryor, J., 1891) 16 N. Y. Supls. 536; 28 Ab. N. C. 47; 41 N. Y. St. R. 614.

[6] Citing Re Coleman (1888) 111 N. Y. 220.

[7] Citing Marx *v.* Man. R. R. Co. (1890) 56 Hun 575; McKinney *v.* R. R. (1887) 104 N. Y. 352, 355.

the effect that the patient was sound physically though morally rotten.[1] But it was said later in the Court of Appeals[2] and the Appellate Division that the Treanor case went too far, and that the Marx case was open to doubt; but in making this criticism of those cases, the court of last resort also said, all concurring, that the decision of its own Second Division in Record *v.* Village of Saratoga Springs[3] was unsound in holding that plaintiff could call as her witness one of two physicians, attending her at the same time and yet plead her privilege to shut the mouth of the other. If this were so, said the Court, "the statute would seem to be a serious obstacle in such cases to the attainment of truth and justice." Yet, although by this decision the Record case, on this point, would seem to be overruled, subsequent decisions do not, apparently, so regard it,[4] and Hope's case[5] decided by a bare majority, remains, holding that if A be attended for the same malady by different physicians at different times, he may call one of them to testify without waiving his privilege as to the other. The Court said, in Morris *v.* Railway, *supra*, that there was a great difference between the case of two physicians simultaneously attending a patient and that of two attending him on different occasions. There is manifestly a difference in the facts; but is it quite clear that the difference in principle is so great as to justify an inference that the statute is any less "a serious obstacle to the attainment of truth and justice" in one class of cases than in the other? The distinction is there, but is the explanation more satis-

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[1] Citing People *v.* Schuyler (1887) 106 N. Y. 298, which also left this point open.

[2] Morris *v.* Railway Co. (1890) 148 N. Y. 88, 93; cf. Rauh *v.* Deutscher Verein (1898) 29 App. Div. 483; Fox *v.* Turnpike Co. (1901) 59 App. Div. 363; Dunkle *v.* McAllister (1902) 70 App. Div. 273.

[3] (1890) 120 N. Y. 646, aff'g without opinion (1887) 46 Hun 448.

[4] Hennessy *v.* Kelley (1900) 55 App. Div. 449, wherein Williams, J., writing for the unanimous Appellate Division in the 4th Dept., says (p. 453) that Barker *v.* Cunard Co. (1898) 157 N. Y. 693, (aff'g without opinion 91 Hun 495) followed the Hope and Record cases.

[5] Hope *v.* T. & L. R. R. Co. (1888) 110 N. Y. 643, aff'g without opinion 40 Hun, 438, cf. dissenting opinion of McLaughlin and Rumsey, JJ., in Rauh *v.* Deutscher Verein, *supra*, at 498; Barker *v.* Cunard S. S. Co. (1895) 91 Hun 495, 157 N. Y. 693; Duggan *v.* Phelps (1893) 82 App. Div. 509.

factory than that given by the grave humor of Sir Thomas Brown for another difference:

> "Why, says the Spaniard, 'Señor Si':
> The Italian, 'Si Signor?'
> Because the one puts that behind,
> The other puts before."

It seems, then, to be the law in New York that a patient by testifying on the trial as to what his doctor said or did, may waive his privilege so far as to allow his physician to be called in rebuttal; yet to testify himself and call physicians to testify as to his infirmity, which he has put in issue, does not *ipso facto* waive his right to prevent his other physicians from telling the truth about it; and the Treanor case to the contrary, is discredited.[1] The Marx case is differentiated from the Treanor case by the fact that in the former the patient, by testifying to what the physician had said, made the doctor's testimony as to that which took place competent in rebuttal, on the theory that if the patient sets the consultation-room door ajar his adversary may push it open. Disciples of the "Angelical Doctor" would instantly puncture this fallacy,[2] and, as above said, the case is classed as doubtful.

In Rauh *v.* Deutscher Verein[3] this question of implied waiver was elaborately discussed in the opinions of the three prevailing and two dissenting justices. That action sought damages for personal injuries. Plaintiff testified to her treatment at a hospital during a long period. On cross-examination she named one Dr. T. as the physician treating her, so says the prevailing opinion; the dissenters say she identified Dr. C. as the operating surgeon. However this fact may be, the prevailing opinion held that by testifying

[1] This seems also to be the Indiana rule; Citizens St. R. Co. *v.* Shepherd (Ind. 1902) 65 N. E. 765, but not in Missouri, Highfill *v.* Mo. P. Ry. Co. (1892) 93 Mo. App. 219, but cf. Holloway *v.* Kansas City (Mo. 1904) 82 S. W. 89, or, of course, in any jurisdiction providing by statute to the contrary.

[2] In Rauh's case, *supra*, it was said, in the dissenting opinion, page 498, "A waiver may be inferred from circumstances, but there must be something present from which it can be at least inferred that the party waiving does so willingly, voluntarily, purposely and intentionally." Now where A has lied as to the case, or as to what the physician said of it, one cannot infer that he would willingly waive his right to prevent the latter from telling the truth, ergo, he has not waived it.

[3] *Supra.*

that she had been operated on six times, etc., and that she knew pieces of bone had been taken from her leg because she heard the doctors say so, she waived her privilege, and it was therefore error of the trial court, to rule that defendant could not obtain from Dr. T. "a disclosure of what he ascertained by an examination of this woman while she was his patient." It was said that the Morris case neither disapproved nor overruled the Marx case, the conclusion of which is "unassailable," and held that "if the privilege is once waived by the patient, the waiver extends to the whole professional conduct of the physician," since a party cannot "sever her privilege and waive it in part and retain it in part;" from which it would seem to follow that the patient, if he testify to any fact of the physician's treatment, opens the door not only to contradiction upon that specific point, but to an exhibition of the entire course of treatment.[1] Subsequently in another case wherein a defendant called plaintiff's physician, it was held that the latter's examination must be limited to a contradiction of the patient's testimony as to acts or statements by him in the medical man's presence or attributed by him to the latter; and it was said that this is the doctrine of the Rauh case; the conclusion of the court being that the question of express waiver largely depends upon the extent to which "patient's testimony enters into the details of consultations with the physician."[2] Still later, where plaintiff called a hospital physician "for a special purpose," apparently to prove his condition in the hospital to which he was taken after an accident, it was held that he waived his privilege entirely and authorized defendant to call the same physician to reveal all the information acquired by that physician in subsequent attendance upon him for the same injuries.[3]

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[1]But see Dunkle *v.* McAllister (1902) 70 App. Div. 273, *infra.*

[2]Fox *v.* Turnpike Co. (1901) 59 App. Div. 363.

[3]Powers *v.* Met. St. Ry. Co. (1905) 105 App. Div. 358 following Rauh's Case. The question arising recently upon an application for a certificate of reasonable doubt, Recorder Goff of New York City held, that the former waiver of defendant when a party to a civil case was good for all time and available against him in a criminal action. People *v.* Blume, N. Y. L. J. Dec. 28, 1905, cf. Schlotterer *v.* Brooklyn and N. Y. Ferry Co. (1903) 89 App. Div. 508.

Hennessy *v.* Kelley,[1] holding that the Record case was still authority despite the criticism of it in Morris *v.* R. R. Co., was an interesting action. Plaintiff, a "female physician," sued defendant, "a gentleman patient," for her fees. He ungallantly pleaded malpractice as a defense, alleging that she wrongly diagnosticated his case and, instead of treating him for the malady that he had, treated him for a disease that he had not, with the result that he suffered great pain, loss of time and rest to his damage in the sum of $200, for which he counterclaimed. It transpired from the evidence that plaintiff had made a first diagnosis of "grippe" and a second of "malaria" and treated Mr. Kelley accordingly for those rather general ailments. She also called in consultation Drs. Brown and Quinn, each of whom made one visit. Dr. Brown agreed with her diagnosis; but Dr. Quinn suggested calling in Dr. Kilbourn, a surgeon, who with Dr. Kinloch performed an operation, whereafter defendant, as the report says, "recovered without the aid of any medicines whatever." Upon the trial, defendant's wife, his nurse, and the two surgeons appeared to have testified fully as to his condition. He also testified and gave his version of Dr. Brown's call in consultation. The details of his affliction, its nature and possible causes, are preserved in the reports and records of the Appellate Division, for edification and instruction. The plaintiff called Drs. Brown and Quinn. The former testified that defendant gave him the same clinical history as that given to plaintiff, whereupon he agreed with Dr. Hennessy in her diagnosis. Dr. Quinn testified, however, that the patient, being franker with him, had revealed specific conditions which he had not imparted to the plaintiff; and, when asked why he had withheld this true clinical history, replied that "he did not tell about it because he did not want to speak about it to a lady." Here was a very pretty defense to the counterclaim of malpractice: for a physician can scarcely be held liable for mistakes if misled by the patient's concealment of the truth—whether out of motives

[1](1900) 30 Misc., 703, reversed 55 App. Div. 449. In Smart *v.* Kansas City (1902) 91 Mo. App. 586, plaintiff's physician was not allowed to testify that the patient had not said to him that his ailment was caused by the accident; the inference from silence being regarded as a communication and privileged.

of delicacy or not is immaterial. So the plaintiff had her verdict. But on appeal it was held that the learned County Judge had erred in allowing Dr. Quinn to testify upon the theory that the plaintiff having put all the facts in evidence had waived his privilege. Dr. Brown's testimony was held to have been properly allowed because of defendant's statements as to what occurred on the occasion of his visit, but Dr. Quinn's evidence was considered inadmissible because defendant had said nothing whatever as to his call. For this error the lady's judgment was reversed. A case could scarcely be imagined better illustrating how admirably this rule of privilege may operate to suppress an essential fact, the revelation of which would be creditable rather than otherwise to the patient, in an action wherein he and his witnesses, for small personal gain, elect to reveal everything confidential that might reflect upon him.

This point that a patient's testimony as to his physician's attendance does not waive the privilege unless that testimony narrates statements made or acts done by the medical man which he may contradict, is further illustrated by the case of Dunkle *v.* McAllister.[1]

Where A sued B for damages for injuries, alleging that B had shot him with a rifle, and B defended alleging that A's injuries were due to a blow, A testified to his hurts and that "Dr. V. came and put plasters on." B called A's physician to testify that in his opinion the injuries were caused by a blow, not by a rifle shot. The court held that while this testimony was very material and bore directly on the question of punitive damages, yet it did not contradict A's statement of what Dr. V. said or did, and was therefore incompetent, since no case has gone so far as to hold that a plaintiff by testifying to the character of his injury waives his right to enjoin secrecy on his attending physician. It is finally to be remarked upon the point of waiver that insurance companies and associations, having met the provision that the waiver should be express by incorporating, into the applications, agreements to waive, which the courts held to be valid,[2] the amendment of 1891 was procured requiring that the waiver must be made upon

[1] (1902) 70 App. Div. 273.

[2] Foley *v.* Royal Arcanum (1896) 151 N. Y. 196.

trial. Question then arose as to the meaning of "on the trial;" and it was held in Dougherty *v.* Metropolitan Life Ins. Co.[1] that if the waiver embraced in the contract was placed of record on the trial the statute was complied with. This rule was followed in the ensuing year by the Appellate Division in Holden *v.* Metropolitan Life Ins. Co.[2] So that up to this point six appellate justices, with no dissent, and one judge at circuit as against one judge at circuit were of opinion that a prior waiver put of record on trial, satisfied the statute. The Holden case, however, was reversed by the votes of seven judges in the Court of Appeals,[3] including Cullen, J., who had not sat in the Dougherty case, who held that "the plain effect of the statute was to limit as to the time and place where and when each waiver shall be made." Prior to the handing down of the decision those interested in excluding such testimony secured the amendment of 1899 requiring waivers to be made in open court; and there they now must be made unless made by the attorneys.

Subsequently the question of implied and continuing waiver came up in Schlotterer *v.* Brooklyn & N.Y. Ferry Co.[4] On a first trial resulting in a non-suit, defendant called plaintiff's physician who was allowed to testify without objection. On the new trial objection to this testimony was sustained. The Appellate Division in the Second Department held this to be error, that the former failure to object was a waiver, and for all time.[5] Jenks, J., pithily said, "The purpose of the statute is to cover the relation of physician and patient with the cloak of confidence. But the purpose is to save the patient from possible humiliation and distress, not to enable him to win a law suit. Now, if the patient once permit the physician to testify, there is no longer any reason at any time for excluding competent testimony under the plea of public policy." It has been very recently held, however, in the First Department that if a party take the deposition of his physician *de bene esse*, that does not consti-

[1] (1895) 87 Hun 15.
[2] (1896) 11 App. Div. 426.
[3] Holden *v.* Met. Life (1900) 165 N. Y. 13.
[4] (1903) 89 App. Div. 508.
[5] Citing McKinney *v.* Grand St. Ry. Co. (1887) 104 N. Y. 352.

tute a waiver in open court on trial; and if he finds that the testimony is unfavorable to him, he may suppress it after fully disclosing the confidence intended by the statute to be privileged.[1] Here, again, there were two dissents.

Comparable to the cases wherein a party after opening his own mouth is allowed to close his physician's as to the same matter, are the actions heretofore alluded to, in which evidence already published to the public, and, therefore, no longer confidential, is suppressed under the rule. In an infant's action against a mutual aid association,[2] it transpired that the plaintiff's guardian, although only bound to prove the fact of the insured's death, furnished proof by physician's certificate of a cause of death that was urged in defence. The certificate was held incompetent under § 834, the court saying, "The disclosure by a physician of information acquired in his professional character in attending a patient, where not made in the course of his professional duty, is a plain violation of professional propriety"; then, after saying that the statute prescribes no general rule of professional conduct, and that a physician disclosing a patient's secrets in conversation would violate no statute, however reprehensible his conduct might be, the court goes on to say that the statute should be liberally considered to effect its purpose, which was said to be the exclusion of a physician's "testimony in a judicial proceeding in any form, whether by affidavit or oral examination, involving the disclosure of confidential information acquired in attending a patient unless the seal of secrecy is removed by the patient himself." What is that "course of professional duty" in which a physician may reveal this information? Are not the filing of death and birth certificates the reporting of contagious diseases, the statement on trial of facts tending to establish

[1] Clifford *v.* Denver & R. G. R. R. Co. (1906) 97 Supl. 707.

[2] Buffalo Loan & Trust Co. *v.* Knights T. & M. M. A. Assn. (1891) 126 N. Y. 450; discussed in Hamilton, *supra*, p. 627. In Corey *v.* Bolton, *infra*, foot-note, holding that a parent or guardian might waive an infant's privilege, it was questioned if he could do so to the infant's disadvantage. See also on the point of entries on hospital records, Kemp *v.* Met. St. Ry. Co. (1904) 94 App. Div. 322, holding that an entry on a hospital's record of a diagnosis is not competent evidence of the facts stated therein; but if it were, the physician making it would be subject to cross-examination as to the facts, its tender being a waiver.

the commission of crime against the patient, all disclosures made in the line of professional duty? And if the rule be intended to protect only confidentially acquired information, should it not apply to all confidences and cease to be applicable when that information has been proclaimed from the house tops? Or is this matter of privilege an exception to the maxim, *cessante ratione cadit etiam lex?* That the certificate in this Buffalo Trust Company case was not admissible as evidence on other grounds seems clearer than that it was incompetent as a breach of privilege.[1] Subsequently this case was followed in another of like nature,[2] but differentiated by its facts. D sued to recover on a life policy. The defence was breach of warranty by the insured in that he falsely stated that no descendants of his grandparents on either side had consumption. Defendant not only produced death certificates assigning consumption as the cause of death of the insured's aunts, but also called the physicians who attended the aunts. It also offered in evidence § 1172 of the N. Y. City Charter, providing that duly authenticated copies of papers in the archives shall be presumptive evidence of the statements therein. It was held that this local regulation does not repeal § 834 and was inoperative to let in such evidence.[3] It was also said

[1] Since the decision of this case, and citing its holding that the statute should receive a broad and liberal construction, the Appellate Term of the Supreme Court has affirmed the ruling below that a father in his action to recover for loss of a child's services, might waive the child's privilege, Scott, J., dissenting. Corey *v.* Bolton (1900) 31 Misc. 138. The same court has also held, citing Donnelly *v.* Insurance Co.(1904) 43 Misc. 87, and Hanna *v.* Ins. Co. (1896) 150 N. Y. 526, that a physician's certificate showing the cause of death, and presented to the company by decedent's widow as part of her proof of death, is competent evidence against her not as a waiver, but as an admission against interest. Carmichael *v.* Jno. Hancock Co. (1904) 45 Misc. 597, distinguishing Robinson *v.* Commandery (1902) 77 App. Div. 215, and Davis *v.* Supreme Lodge (1904) 165 N. Y. 159; cf. Becker *v.* Met. Life Ins. Co. (1904) 99 App. Div. 5.

[2] Davis *v.* Supreme Lodge (1900) 165 N. Y. 159.

[3] In Robinson *v.* Supreme Commandery (1902) 77 App. Div. 215, aff'd without opinion (1904) 177 N. Y. 564 it was held that defendant Insurance Co. could not, in order to prove decedent's breach of warranty that his father had not died of consumption, introduce a death certificate, filed for more than twenty years with the New York City Health Department, although the Appellate Court admitted that under the letter of § 955 of the Code of Civil Procedure, making records of the city department on file for that length of time, presumptive evidence of their contents, the paper was competent. But the court held that the legislature was presumably familiar with the decisions excluding these certificates and if it had intended to make them competent, would have said so specifically. It may be readily

that statements of attending physicians for the purpose of establishing the cause of death of either the insured, his ancestors, or their descendants, are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between physician and patient; but on the grounds of public policy as well. Here is the first suggestion that with us, as in France, this privilege is not purely personal, but rests on grounds of public policy;[1] if that be so, we, too, should be logical in punishing the breach of confidence and denying to the patient the right of waiver. "The disclosure by a physician, whether voluntarily or involuntarily, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it," said the court. What is the involuntary disclosure that is so shocking? Is it that one, which is made under the mandate of the law or the court? Is it not ten-fold more shocking that a physician by silence should aid and abet in the perpetration of fraud and the contamination of innocent lives by poison causing death and worse than death? There are more things in this matter than were dreamed of in the philosophy of the Revisers. But we have given their innovation a sacro-sanct character that has almost led us into abnegation of that sound judgment reserved to themselves by the disciples of Hippocrates in their solemn oath.

There is no provision in the Revision of the N. Y. Statutes or in the Code of Civil Procedure, except the recent amendment relating to minors, permitting the unsealing of medical lips in order to bring crime home to its perpetrator.

admitted that death certificates would be poor proof of the cause of death. There is reason to believe that sometimes they are, if not deliberately untrue, at least only partially true; and very often they are mistaken. But there cannot be any reasonable doubt that if true, they reveal *pro tanto* the patient's secret; and if they are not true, in the vast majority of cases the law requiring their filing should be repealed.

[1] The General Term of the Second Department had said in the Dougherty case, *supra*: "The secrecy imposed upon the physician by the statute is evidently for the benefit of the patient. His communications are privileged, but the public has no concern in their suppression. * * * What possible interest can the public have in the exclusion of this evidence of a physician respecting the physical condition of a private individual where the patient himself raises no objection to such disclosure?" This apparently has not the sanction of the Court of Appeals.

In some jurisdictions the privilege is confined to civil cases; but not so in its birthplace. Therefore the courts have construed away the letter of the statute to the end that justice might be done. In the Pierson case, *supra*, defendant, charged with poisoning one Withey, called to attend decedent before death, one Dr. Coe, who having examined and prescribed for the sick man, was allowed to testify not only to what he learned by his examination but to what he learned from defendant and Mrs. Withey jointly indicted with him for the murder. The Court of Appeals held that the statute must be construed to effect its purpose, which was said to be to protect the patient's welfare by safeguarding confidential communications with a view to his benefit. And accordingly it was held that where A was on trial for manslaughter of B by committing an abortion upon her, his confession made to a physician, whom he had called in to save the woman's life, with a view to aiding the diagnosis was not competent evidence against him, although in fact he was not the patient.[1]

The safeguards thrown about the privilege by the Revisers, as has been seen already, were (1) that the physician should be "duly authorized" to practice, a limitation of doubtful advantage to patients in general, some of whom employ "scientists," "paths" and what not; (2) the existence of the professional relation; (3) the acquisition of the information in that relation and (4) the necessity of the information for the treatment of the case. As to the first, it has been held that a license will be presumed when that question arises collaterally, as where a physician is called as a witness; and in civil cases generally the burden of proof is on him who denies the license[2] although in penal and criminal actions for unlawful practice the burden is on the defendant.[3] And it has been also held that in order to

[1] People *v.* Brower (1889) 53 Hun 217; and see cases cited in Hamilton, *supra*, p. 624 *et seq.* In Seifert *v.* State (Ind. 1903) 67 N. E. 100, it was held that B, as physician, in order to contradict her dying declaration charging C with procuring a criminal operation, might testify that she asked him to perform an abortion and said that C was responsible for her condition, but had advised against the operation and offered to marry her.

[2] City of Chicago *v.* Wood (1887) 24 Ill. App. 40; No. Chic. &c. R. R. *v.* Cotton (1892) 140 Ill. 486; Will *v.* Cowles (1887) 45 Hun. 307; Record *v.* Saratoga Springs (1887) 46 Hun. 448, affirmed (1892) 120 N. Y. 646.

[3] People *v.* Fields (1889) 52 Hun. 65. Many cases to this point are cited in a brochure by the writer entitled Legal Decisions and containing a brief for the prosecution of such actions.

exclude a physician's testimony as violation of privilege the burden is on the objector to establish the other three essential elements of privilege.[1]

In New York and in other States even a licensed physician is not "duly authorized to practice" until he has registered in the office of the county clerk. And in Will *v.* Cowles, *supra*, holding unanimously that an unlicensed person giving plaintiff medical treatment might testify to information so acquired despite the patient's objection, it was noted in one of the two concurring opinions that the witness was both unlicensed and unregistered. Nevertheless a very able judge ruled at trial term that a physician suing for fees could not prove his services by the testimony of a licensed but unregistered physician.[2] The learned court attempted to distinguish Will *v.* Cowles on the ground that the practitioner in that case was not licensed; and held that the registration act only affected the practitioner, rendering him liable to its penalty and preventing him from recovering fees[3] but did not deprive the plaintiff of his privilege. As the statute in force at the time[4] expressly provided that no person should practice medicine unless both licensed and registered, the distinction drawn by the learned judge seems hardly tenable and his decision seems to be in the teeth of the statute. If there is anything in his argument, and all of his arguments were well informed, the new provision as to registered nurses in the New York statute would seem to come within it; and every nurse whether registered or not is a sealed vessel.

When does the professional relation exist?[5] This too has puzzled the legal mind. It has been said, for instance, that

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[1] Griffiths *v.* Met. R. R. Co. (1902) 171 N. Y. 106, reversing (1901) 63 App. Div. 86; Green *v.* Met. St. Ry. Co. (1902) 171 N. Y. 201, reversing (1901) 65 App. Div. 54.

[2] McGillicuddy *v.* Farmers Loan & T. Co (1899) 26 Misc. 55. In Head Camp of Woodmen *v.* Loeher (Colo.) (1902) 68 Pac. 136, it was held that communications to a physician duly licensed in another State were not within the rule.

[3] cf. Fox *v.* Dixon (1890) 34 N. Y. St. R. 710.

[4] Ch. 647 Laws of 1887 N. Y., now part of the Public Health Law.

[5] In Bacon *v.* Frisbie (1880) 80 N. Y. 394, *supra*, where an attorney disclaimed that such relation existed between him and a client it was said that this question was for the court to decide, not for the attorney. See Griffiths *v.* Met. Ry. Co., *infra*, for the application of the rule to physician and patient.

casual advice to a friend does not constitute the relation.[1] Yet, unless a confidential communication made on such an occasion be privileged, then the Revisers failed to meet either aspiration of Buller, J. That question, however, did not arise in the case cited, where a retired physician gave first aid to a wounded man pending the arrival of the latter's physician, the point being whether he as "attending physician" should have certified the cause of death; but *quære* whether his information so acquired could have been excluded under objection. The relation of physician and patient presupposes the consent of both parties but the courts hold that it may exist without express consent as in case of first aid and even against the patient's will as in the Meyer case, *infra*.

It has been said that at least an intention to prescribe for, or otherwise medically treat the case must exist in order to constitute the relation, and when A, plaintiff's attending physician, asked B, a surgeon, to examine the case with a view to qualifying, or, as suggested, disqualifying him as an expert witness, it was held that mere proof of an examination under these circumstances, with no proof of expectation that B should treat the case or advise as to treatment, was not enough to exclude the information acquired in the examination. It is true the appellate court specifically said that the error at circuit lay in holding that the burden was on proponent of the evidence to prove it competent, instead of being on the objector[2] to show it incompetent. None the less upon the evidence before the Court, B had been called on in his "professional capacity" to examine A and give a surgical opinion as to the extent of his injuries; and the old qualification that the information acquired should be necessary to enable the medical man to

[1] Gibson *v.* Am. Mut. Life Ins. Co. (1868) 37 N. Y. 580. cf. Edington *v.* Mut. Life Co. (1875) 5 Hun 1, reversed on another point (1876) 67 N. Y. 185; State *v.* Lyons (1904) 113 La. Ann. 959, holding that a physician's visit to a wounded friend in hospital was not necessarily a professional call.

[2] Henry *v.* N. Y., L. E. & W. R. R. (1890) 57 Hun 76, never cited, reversed or overruled. Under the Missouri statute, which, like our revision, provides that the excluded information must have been necessary to aid in prescribing, etc., it was held that information acquired by examining a party in order to qualify as a witness was not privileged. Arnold *v.* City of Maryville (1905) 85 S. W. 107. But a consultant acts in a professional capacity. Green *v.* Town of Nebagamain (Wis. 1902) 89 N. W. 520.

prescribe or treat the case having been theretofore eliminated from the statute, it would seem to follow that the General Term in that case held that a surgeon examining a case at a party's request, with a view to qualifying as an expert, is not attending him in a professional capacity, although beyond doubt acting in a most confidential relation, and acquiring information expressly with a view to its introduction into, or possibly its exclusion from litigation.

In Griffiths *v.* Met. St. Ry. Co.[1] these facts appeared: Dr. M., who was at the scene of the accident, rendered first aid to plaintiff, a boy, in a drug store, stopping the flow of blood. Upon the arrival of an ambulance he rode in it with the boy part of the way to the hospital, where he was an attending physician. He was also a surgeon of the defendant company. Ten days later he had a talk with the boy in the hospital and solely with reference to how the accident happened; he did not tell the boy until afterwards that he was the same doctor who treated him in the drug store, and did not think the lad knew he was. The trial judge and three justices of the Appellate Division[2] considered that this testimony, as to how the accident happened, was incompetent.

The prevailing opinion in the Appellate Division said of this physician, in the employ at once of the defendant and the hospital: "After the plaintiff was taken to a drug store he went in to see him and volunteered his services to stop the flow of blood until the ambulance arrived. He subsequently saw the boy at the hospital, ten days after the accident. The boy was then in bed in the ward, and the witness asked him to tell the details of his accident, to which the plaintiff made a reply. He certainly, while thus attending to the boy to stop the flow of blood, occupied to the boy the relation of physician, and when the witness subsequently went into the hospital, after the amputation of the boy's leg, and asked him questions as to the accident, the boy was justified in treating him as a physician who had attended him."[3] Two justices concurred in this opinion and two dissented on the ground that the lad did not remember the

[1] (1902) 171 N. Y. 106, *supra*, Cf. Green *v.* Railway, *infra*.

[2] Griffiths *v.* Met. St. Ry. (1901), 63 App. Div. 86.

[3] *Ibid* 88–89.

doctor, who, moreover, was not treating him and did not acquire the information for the purpose of aiding in any treatment. The judicial minds at this stage were equally balanced, three to three. In the Court of Appeals[1] all concurred in reversal, except one not voting; and Werner, J., writing the opinion said: "Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion that the conversation which the doctor was about to give had any relation to professional treatment." Following this came the case of Meyer *v.* Supreme Lodge, Knights of Pythias,[2] wherein it appeared that A, the insured, being violently ill in a hotel, the clerk called in a physician, B, to attend him. A protested against this, cursed B, and in reply to the latter's inquiry said it was none of his business what he had been doing and ordered him away. B, seeing a box of rough on rats, an arsenical preparation, apparently spoke of it and A said he had taken it because he wanted to die, that he wanted to die, didn't want to get well and didn't want B to do anything for him. Nevertheless, B against A's will prepared a hypodermic "and stimulated him, so he would not die in the Hotel Iroquois." To thwart decedent's purpose to die on the premises, seems, then, to have been, if not the chief, at least one purpose of the hotel people in calling the physician; and it does not appear who paid the doctor's bill. However that may be, the physician, despite the protests of decedent, who, with foul curses, cried, "You keep away from here. Didn't I tell you before to keep away," paid no attention to him and gave him the hypodermic. The suicide was immediately carried to a hospital and died soon afterwards. B made a deposition *de bene esse*, in which the facts were set out together with his statement that the man died of arsenical poisoning, and that the symptoms showed it. Nevertheless his testimony was excluded by the learned trial judge on the ground that his information was acquired in the professional relation, etc.; the Appellate Division unanimously affirmed the judgment[3] and the Court of Appeals, in turn, affirmed but with two dissents and one

[1] *Ibid.* (1902) 171 N. Y. 106.

[2] (1904) 178 N. Y. 63.

[3] (1903) 82 App. Div. 359.

absent justice, who would have voted for affirmance if we may judge from his previous vote in the then recent case of Griffiths *v.* Met. St. Railway.[1] So that in the opinion of ten judges against two, it was proper to exclude the very material evidence that the deceased had committed suicide, upon the ground that the necessities of the case justified the physician's attendance and constituted a sacred professional relation between him and a man who absolutely rejecting that relation, made no confidential communication. Where there is evidence that a patient was permanently or temporarily insane there is a fair contention that a physician called to attend him, by authorized persons, stands in a confidential relation to him; but no such contention was or could have been made in the Meyer case. A sane guest at a hotel purposed to commit suicide by poison. The hotel clerk called a physician to prevent by medical means the accomplishment of that purpose on the premises. The medical man did, with his hypodermic, effect that purpose and promptly turned the guest over to the hospital physicians. Certainly B was not more an attending physician than the doctor in the Gibson case, *supra*. He was not even a volunteer whose first aid was at least tacitly accepted as in the Griffith case. The patient was not unconscious. The physician was not called by friends of a madman to take the latter in charge. If decedent had survived, could he have been held liable for the fee? Suppose that there had been no hypodermic administered; that A had climbed to the window sill before B's arrival, and had said: "I am going to jump to death, poison has failed," and suppose that B had tried to prevent the suicide, unsuccessfully, by seizing A's leg. Would the relation of physician and patient have arisen, or did it grow out of the hypodermic?[2]

When we come to consider the final safeguard, namely, that the excluded information must have been of a nature to enable the medical person to act in a professional capacity, we again find widely varying opinions as to what is intended by the rule. The revision provided that the ex-

[1] (1902) 171 N. Y. 106.

[2] Renihan *v.* Dennin (1886) 103 N. Y. 573 is cited in Duggan's case to the point that there need be no contractual relation. But Renihan's case involved the relation of a consulting physician who Earl, J., expressly says "did not thrust himself into his (the patient's) presence, or intrude there."

cluded information must be such as would enable the physician to prescribe or do some surgical or other act for the patient. It became a narrow question in many cases whether or not the information sought to be excluded was necessary to those ends; and upon this point the Court of Appeals has said that where "the evidence shows facts which indicate that the information was necessary for professional treatment, the trial judge is the sole judge of its admissibility, notwithstanding the physician's statement to the contrary.[1] The question has been exhaustively discussed, notably in the cases of Edington and Grattan *v.* The Insurance Companies.[2] One of its most recent outcrops is in Green *v.* The Met. St. Ry. Co.[3] That was an action similar to the one in the Griffith case reported in the same volume, and brought by another injured child against the same defendant, which produced as a witness the same physician, M. The facts were slightly different. This time M. was not a volunteer, but went with the ambulance in discharge of his hospital duty to take the injured boy to the institution. He asked the patient how the accident happened. The information so acquired was excluded, and the Appellate Division of the First Department seems to have been unanimous in sustaining this ruling, although there was dissent on the point of negligence, and one justice concurred only in the result. The prevailing opinion held that while the information as to the manner in which the accident occurred might not have been necessary to aid treatment of the case from a medical standpoint, yet, inasmuch as it was necessary to enable the medical witness to comply with the hospital rules requiring the history of the case, including details of the accident, to be entered on its books,

[1] Griffiths *v.* Met. St. Ry., *supra*, citing Bacon *v.* Frisbie (1880) 80 N. Y. 394, 399. This is the case cited *supra* wherein an attorney disclaimed that the professional relation existed between him and a client. Manifestly the court might pass upon the necessity of information to the conduct of a law case better than upon its necessity to medical treatment of a patient.

[2] (1876) 67 N. Y. 185; (1879) 77 N. Y. 564; (1880) 80 N. Y. 281; and cases cited in 1 Hamilton, Legal Medicine, p. 618.

[3] (1904) 171 N. Y. 201, reversing (1901) 65 App. Div. 654. Other recent cases in which physicians, examining injured persons to learn their condition for the adverse party, have been forbidden to testify on the ground of privilege are Munz *v.* Salt Lake City R. R. Co. (Utah 1902) 70 Pac. 852; Battis *v.* Ch. R. I. and P. Ry. Co. (Iowa 1904) 100 N. W. 543.

it was an act in the line of his duty as staff surgeon, which was equivalent to an act done in a "professional capacity." It was aptly pointed out by Paterson, J., that there was, presumably, a legislative intent to enlarge the scope of privilege when the words of the revisers limiting the privilege to information necessary to enable the doctor to prescribe or give surgical treatment were changed to the present words limiting it to such information as would enable the medical man to act in a "professional capacity," which therefore may include acts not of a strictly medical character. The Court of Appeals reversed this judgment by a divided vote of four to three,[1] Werner, J., who wrote the opinion in the Griffith case, now writing the dissenting opinion. The prevailing opinion held that, admitting the existence of the professional relation, the knowledge acquired as to the way in which the accident happened was not necessary to enable witness to act in his professional capacity.[2] The dissenting opinion distinguished the Griffith case as one in which the information was acquired out of the professional relation.

From this review of modern instances certain general conclusions seem fairly inferable. The confidences that Buller, J., would have guarded are still without protection; for it is, to say the least, doubtful whether, under the New York and most of the other statutes, the knowledge of Mr. Hawkins that the Duchess had married Mr. Hervey could have been excluded. He does not seem to have actually delivered her, and if he had done so that information was not necessary to enable him to treat the case or act in a professional capacity; for the most subtle judicial mind would scarcely attempt to distinguish between the medical procedures in bringing into the world legitimate and illegitimate children. In searching the reported cases one finds very few wherein the privilege is claimed to cover a secret. Rather is it invoked, to use Mr. Justice

[1] (1902) 171 N. Y. 201.

[2] In Griebel *v.* Brooklyn Heights R. R. Co. (1902) 68 App. Div. 204, handed down January, 1902, four months prior to the reversal of Green's case, the Appellate Division, in the Second Dept., held that a plaintiff's statement of the manner of his accident to the ambulance surgeon was not privileged, being unnecessary to aid the treatment of the case; but it did not appear there that the inquiry of the surgeon was in the line of his duty or enabled him to keep the hospital records.

Jenks expression "to win a case." In the article before cited it was said that "It needs no argument to show the unfairness, if not dishonesty, as a general rule, of those who bring actions to recover damages for their physical injuries, yet will not permit the best evidence of the nature and extent of those injuries to be put before the jury." It was also suggested that the effort to suppress such evidence would defeat its own purpose by prejudicing jurors.[1] Then fortunately the event does not seem to have borne out the prophecy; for although it has been held that the jury may draw inferences from the failure to produce the attending physician or to prevent his testimony;[2] yet they seem, as a rule, little disposed to do so, entering into the spirit of the game and appreciating the technical success of the advocate who excludes the testimony. The burden of proof seems to be upon those who support a rule designed to suppress the truth that the court is seeking. That burden can only be sustained by showing that in a jurisdiction where the rule does not obtain the relation between patient and physician is less regarded, that greater injustice prevails in this respect, and that confidence is more often disclosed. For the confusion in judicial opinions the fault lies not with the courts so much as with the statute. Judges have taken the law as they found it. They have been dominated by the idea that they were really protecting the "innocent secrets" of the sick. The fact seems to have been otherwise. It certainly seems desirable that if these statutes be not repealed altogether they should be modified so as not to enable the unscrupulous to suppress in evidence what is no secret outside the court room.

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[1] Hamilton, Leg. Med., p. 626.

[2] Deutschman *v.* Third Ave. R. R. Co. (1903) 87 App. Div., 503.